



Too Many Damn Lawyers And Other Legal Perspectives

Division of Mined Land Reclamation
Total Maximum Daily Load (TMDL)
Workshop
September 28, 2006

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Section 303 of the Clean Water Act provides, in relevant part:

(d)(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters.

(d)(1)(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

- EPA's TMDL rules are codified at 40 CFR Part 130.
- EPA first promulgated these rules on January 11, 1985 (50 Fed. Reg. 1774), and last amended them on July 24, 1992 (57 Fed. Reg. 33040).
- EPA attempted to overhaul the national TMDL program in 2000 by promulgating extensive TMDL rule revisions. Those revisions were assailed from all sides, challenged in court, suspended by Congress, and ultimately withdrawn by EPA in March 2003.



Instead of using a comprehensive regulatory program to manage the TMDL process (akin to the NPDES program), EPA has relied principally on guidance.

- *Guidance for Water Quality-Based Decisions: The TMDL Process* (April 1991)
- *Water Quality Guidance for the Great Lakes System: Supplementary Information Document on Total Maximum Daily Loads* (March 1995)
- *Guidelines for Reviewing TMDLs under Existing Regulations Issued in 1992* (May 2002)
- *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (November 2002)
- *Clarification on TMDL Revisions and Load/Waste Load Adjustments* (Draft February 2006)
- *Establishing TMDL “Daily” Loads in Light of the D.C. Circuit’s Decision in Friends of the Earth, Inc. v. EPA et al., No. 05-5015* (April 25, 2006) and *Implications for NPDES Permits* (Draft July 2006)
- *Clarification Regarding “Phased” Total Maximum Daily Loads* (August 2006)

EPA's TMDL program has been heavily critiqued, both from within and from other federal agencies:

- *Assessing the TMDL Approach to Water Quality Management, Committee to Assess the Scientific Basis of the Total Maximum Daily Load Approach to Water Pollution Reduction, National Research Council (2001)*
- *The Twenty Needs Report: How Research Can Improve the TMDL Program, EPA (July 2002)*
- *Improved EPA Guidance and Support Can Help States Develop Standards That Better Target Cleanup Efforts, U.S. General Accounting Office (January 2003)*



- EPA's TMDL program has also been litigated, both on its face and as implemented.
- However, there are less cases than you might think.
- Most deal with scheduling and other procedural issues like standing, ripeness and finality.
- Only two handfals address head-on the substance of TMDLs and TMDL implementation.



MCEA v. EPA, MN Federal District Court (June 23, 2005)

Amigos Bravos v. EPA, DC Federal District Court (March 3, 2004)

Friends of the Wild Swan v. EPA, Montana Federal District Court (July 25, 2003)

Tesoro Refining v. San Francisco Baykeeper, California State Court (May 30, 2003)

City of Arcadia v. EPA, California Federal District Court (May 16, 2003)

Pronsolino v. Nastri, 9th Circuit Court of Appeals (May 31, 2002)

In re: City of Msocow, Idaho, Environmental Appeals Board (July 27, 2001)

Monongahela Power v. West Virginia, WV State Court (April 30, 2001)

NRDC v. Fox, NY Federal District Court (May 2, 2000)

Dioxin/Organochlorine Center v. EPA, 9th Circuit Court of Appeals (June 22, 1995)

Litigants often fail, fail and try again. Consider, for example, the raging “daily load” debate:

“Congress, in one sentence, directs EPA to approve TMDLs for hundreds of different pollutants in thousands of different waterbodies, and it is excessively formalistic to suggest that EPA may not express these standards in different ways, as appropriate to each unique circumstance.” *Fox* (2001)

“We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis. Such a reading strikes us as absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one.” *Muszynski* (2001)

“Daily means daily, nothing else.” *Friends of the Earth* (2006)



Virginia's TMDL program is influenced by these cases and other developments at the federal level, but it is also guided by separate state law. Our state law is unique in:

- Requiring the development and implementation of a plan to achieve fully supporting status for impaired waters.
- Requiring the plan to account for relative costs and benefits.
- Providing a process for conducting use attainability analyses (before, during or after TMDL development) where there are reasonable grounds to indicate that attainment of a use is not feasible.



- Virginia is leagues ahead of other states in developing and implementing TMDLs.
- Compare the hundreds of TMDLs developed in the Commonwealth over the past five years with the handful developed in the State of South Carolina, or the many states that have defaulted on their TMDL obligations altogether (effectively forcing EPA to take-over the state TMDL programs).



The TDS TMDLs for Virginia's coalfield creeks that were adopted by the State Water Control Board in March 2006 reflect the best of EPA's guidance, Virginia's unique statutory requirements and a cooperative solution to overcome lingering technical issues.

- Defers end-of-pipe reductions from existing and future point sources *until after* additional data are collected and DEQ reopens, reviews and revises TMDLs.
- Focuses first phase of implementation on monitoring, so that DEQ has sufficient data to revisit its original assumptions about TDS as a stressor, 334 mg/l as a target and the modeling projections.



- Accommodates growth, provided new dischargers monitor their loading and implement any BMPs required by the Virginia Coal Surface Mining Reclamation Regulations.
- Emphasizes the need for DEQ and DMME to select BMPs that are both cost-effective and reasonable to implement, consistent with instructions from the State Water Control Board in September 2005.
- Links attainment to recovery of the benthic community as opposed to some arbitrary ambient TDS concentration.
- Acknowledges that a Use Attainability Analysis may be an appropriate parallel path during the first phase of TMDL implementation.



Cooperative solution stands in stark contrast to arbitrary TMDL approaches in other states:

- Savannah Harbor DO TMDL: Calls for 120% reduction in oxygen demanding substances from regulated dischargers.
- Shades Creek Sediment TMDL: Calls for across-the-board percentage reduction in TSS based on an unsubstantiated hypothesis that stable geophysical conditions will support healthy biota.
- Conestoga Headwaters Nutrient TMDL: Assigns water quality target based on water quality conditions in a reference stream designated as “high quality” under state’s antidegradation policy.

Those approaches invariably end up in litigation, forcing all parties to incur potentially avoidable costs and stalling any meaningful environmental progress for many years.



"I've always felt that my role as a beaver transcends any political changes at E.P.A."